INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:	
Bierndt v. *United States*, 3 F. 2d 141	7
Bolling v. *United States*, 318 F. 2d 863	7
DiCarlo v. *United States*, 6 F. 2d 364, certiorari denied, 268 U.S. 706	7
Eidson v. *United States*, 272 F. 2d 684	7
People v. *Gould*, 54 Cal. 2d 621, 354 P. 2d 865	8
People v. *Trowbridge*, 305 N.Y. 471, 113 N.E. 2d 841	8
Poole v. *United States*, 97 F. 2d 423	7
United States v. *Forzano*, 190 F. 2d 687	7, 8
United States v. *Fox*, 97 F. 2d 913	7
Wininger v. *United States*, 77 F. 2d 678	7
Statutes and rule:	
Hobbs Act, 18 U.S.C. 1951	2
N.Y. Code Crim. Proc., Sec. 393-b	8
Rule 22-2, Rules of the Supreme Court	6
Miscellaneous:	
McCormick, *Evidence* (1954):	
§ 39	6
§ 224	6
4 Wigmore, *Evidence* (3d ed. 1940), § 1130	7, 8
5 Wigmore, *Evidence* (3d ed. 1940), § 1362	6

732-790—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1088

FRANCIS J. DESISTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1964. On April 22, 1964, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 4, 1964. The petition was not filed as prescribed by Rule 22–2 of the Rules of this Court until May 8, 1964.[1] The juris-

[1] The petition was served on the United States on May 1, 1964, and a copy of the petition was also submitted to the Clerk of the Court on that date. The record was not filed before May 8, however.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the filing requirements of Rule 22–2 of the Rules of this Court should be waived in this case.

2. Whether a witness's prior identifications of petitioner could be introduced as affirmative evidence of guilt.

3. Whether the evidence was sufficient to sustain the verdict.

4. Whether there were errors in the district court's instructions to the jury.

STATEMENT

Petitioner was convicted after a trial by jury in the United States District Court for the Eastern District of New York of violating the Hobbs Act (18 U.S.C. 1951), in that he hijacked a truck which was transporting goods in foreign commerce (I. R. 2–3a, 50a).[1] He was sentenced to a term of six years' imprisonment (I. R. 50a). The court of appeals affirmed unanimously (Pet. 19–29).

The principal issue at the trial concerned the identification testimony of Norman Fine, the driver of the

---

[1] The record is in two parts: volume one, which has been designated "I.R.", contains petitioner's appendix in the court of appeals; and volume two, designated "II.R.", consists of the government's appendix and the proceedings in the court of appeals. In addition, a transcript of the trial has been lodged with the Clerk and designated "Tr.".

At an earlier trial two codefendants, Frank LoCicero and Joseph Saponaro, were acquitted, and petitioner was convicted. That conviction was subsequently reversed by the court of appeals (289 F. 2d 833).

hijacked truck. Fine told the court that shortly before 3:00 p.m. on September 1, 1959, about fifteen minutes after he had picked up a shipment of silk fabrics at a pier in Brooklyn, New York,[3] his truck was stopped by an Oldsmobile parked at a 45-degree angle in the middle of a city street (II. R. 2–5b, 10–11b, Tr. 23). A man approached from the direction of the automobile, stepped upon the running board of the truck, and, with his face approximately eighteen inches from the driver, threatened to kill Fine unless he pulled over to the curb (II. R. 5b). After obeying the order, Fine was driven away in the Oldsmobile by two other men who, some forty minutes later, left him handcuffed to a tree in a wooded area of a local park (II. R. 6–11b). The first man remained behind with the truck. On direct-examination Fine identified ~~as petitioner~~ the first man (II R. 5–6b, 9b). However, Fine retracted the identification on cross-examination. He remembered that the man who threatened to kill him wore a short-sleeved shirt, but did not recall seeing tattoo marks on the man's arms (I. R. 7–9a, Tr. 101–102). Since petitioner bore a large tattoo mark on each arm,[4] Fine could not say, at the trial, which was three-and-a-half years after the hijacking, that petitioner was the man (I. R. 8–9a, 19a, II. R. 12b). Fine further testified that some aspects of the robbery were "hazy" in his mind, particularly whether the man walked or ran toward the truck and

[3] It was stipulated that the goods were moving in foreign commerce (II. R. 39b).

[4] Petitioner rolled up his sleeves and showed his tattoos to Fine at the trial. Fine testified, however, that he first learned of the tattoos five days before the trial (I. R. 7a, Tr. 255–256).

how long it took him to cover the distance (Tr. 96). On redirect-examination, Fine related how he described the man to F.B.I. agents on the day of the hijacking (II. R. 16b, Tr. 175–176). He also testified that four days after the hijacking he identified petitioner at a line-up at F.B.I. Headquarters (II. R. 16–20b). The Assistant United States Attorney then showed him a photograph of petitioner, and Fine testified that he had identified the same photograph before the grand jury a short time after the robbery. He also recalled that he was asked, on that occasion, whether there was any question in his mind about the identification and that he answered, "No doubt about it" (II. R. 20–25b). He also remembered identifying petitioner at his first trial in November 1959 and identifying photographs of petitioner in February 1963 in the office of the Assistant United States Attorney (II. R. 25–29b). The trial court denied defense counsel's request for limiting instructions and received the prior identifications as affirmative evidence of petitioner's guilt (I. R. 45–46a, Tr. 176–206).[2]

Other evidence received at the trial included testimony of two F.B.I. agents that petitioner, when observed by Fine in the line-up, wore a short-sleeved shirt, and that the tattoo marks were in plain view

[2] It is true, as noted in the opinion of the court of appeals, that at the conclusion of the case the trial court instructed the jury that prior inconsistent statements went only to a witness's credibility and were not substantive evidence. However, an examination of other portions of the charge, particularly the references to Fine's testimony, reveals that Fine's prior identifications were distinguished from other prior statements and were submitted to the jury as affirmative evidence of guilt (Pet. 23–24; I. R. 37a, 45–46a).

(H. R. 41–43b, 77–78b). Two partners in a truck rental firm, Clesto Auto Service, Inc., testified that petitioner, whom they had known previously, telephoned on the afternoon of the hijacking and asked to rent a truck. One partner—who died before the second trial but whose testimony at the first trial was read into evidence—placed the time of the telephone conversation at 3:15 p.m. The other—who was present at the second trial—testified that it occurred at 3:45 p.m. (J. R. 19–22a, H. R. 48–51b, 60–63b). About 4:00 p.m., petitioner arrived with another man in a car and selected a truck, saying, "I would like that truck. It doesn't advertise you too much." Petitioner paid the deposit, signed the rental agreement, and drove off alone in the truck. The other man departed in the automobile (H. R. 52–54b, 57–58b, 62–64b, Tr. 416–418). On Friday, September 4, the day petitioner promised to return the truck, he telephoned and said that he would be delayed because the truck was loaded with furniture which could not be delivered until Saturday. On the following day he again postponed the return of the truck until the following Tuesday (H. R. 54–56b). On September 4, the hijacked truck was found empty, and on September 6, the stolen silk fabrics were discovered in the rented truck, which was parked in a public garage (H. R. 30–39b, 54–56b, 59–64b).

Petitioner testified that an acquaintance named Joseph Storch offered him ten dollars to arrange for Storch to rent a truck to move furniture (J. R. 24–25a, Tr. 485–487). Petitioner asserted that he telephoned the Clesto agency from a restaurant about 3:15, and

then went to the agency with Storch, who drove away alone in the truck (I. R. 24–25a, II. R. 68–70b, Tr. 470–474).

ARGUMENT

1. The petition is untimely within the meaning of Rule 22–2 of the Rules of this Court, which requires that a petition for certiorari in a federal criminal case be accompanied by the certified record, and that both the petition and the record be filed within thirty days after the entry of the court of appeals' judgment. In the present case, an extension of time to May 4, 1964—a Monday—was obtained, but the necessary papers were not filed until May 8, which was a Friday.

2. The district court did not err in admitting Fine's prior identifications of petitioner as affirmative evidence of guilt. The so-called "orthodox" rule which would limit use of a witness's prior sworn statements to impeachment only has been subjected to substantial criticism by scholars and leading judges.* Observing that the dangers of hearsay evidence are not present if the earlier statements were made under oath and the declarant himself is available for cross-examination at the trial (see 5 Wigmore, *Evidence* (3d ed. 1940), § 1362; McCormick, *Evidence* (1954), § 224), the court of appeals held that prior statements of a witness are admissible as affirmative evidence if they "were themselves testimony before a grand jury or at

* The most extensive criticism of the orthodox rule appears in McCormick, *Evidence* (1954), § 39. See also the writings of Professor Wigmore, Professor Morgan, and Judge Learned Hand cited in the opinion below (Pet. 24–25).

a former trial or were adopted by such testimony" (Pet. 25–26).[7]

Whatever may be the implications of the court of appeals' reasoning in other situations, its application to the present case is patently correct since the evidence was admissible for the narrower reasons given by the district court (Tr. 176–206). Under an established exception to the hearsay rule, a witness may testify to his prior identification of an accused whenever identity is placed in issue at a criminal trial. *Eidson* v. *United States*, 272 F. 2d 684 (C.A. 10); *United States* v. *Forzano*, 190 F. 2d 687 (C.A. 2); *Wininger* v. *United States*, 77 F. 2d 678 (C.A. 8); *Bolling* v. *United States*, 18 F. 2d 863 (C.A. 4); *DiCarlo* v. *United States*, 6 F. 2d 364 (C.A. 2), certiorari denied, 268 U.S. 706. See *United States* v. *Fox*, 97 F. 2d 913 (C.A. 2); *Bierndt* v. *United States*, 3 F. 2d 141 (C.A. 7). Compare *Poole* v. *United States*, 97 F. 2d 423 (C.A. 9) (holding rule inapplicable when person making line-up identification does not testify at trial). See also 4 Wigmore, *Evidence* (3d ed. 1940), § 1130.[8] A special exception is recognized for

---

[7] Fine's prior statements consisted of a description given to the police, a line-up identification, testimony before the grand jury, testimony at the first trial, and identification of petitioner's photograph in the office of the Assistant United States Attorney shortly before the second trial. Only the last item of evidence would not fit within the rationale of the opinion below, and that evidence, in view of the other identifications, was merely cumulative.

[8] The state decisions are in conflict on the subject. See 4 Wigmore, *Evidence* (3d ed. 1940), § 1130, and cases cited in *Eidson* v. *United States*, 272 F. 2d at 686.

prior identifications—as distinguished from other prior statements—because identification at trial, where the defendant is seated at the table reserved for him, is of doubtful probative value, particularly if the witness has seen the accused on other occasions before trial. 4 Wigmore, *Evidence* (3d ed. 1940), § 1130. See *United States* v. *Forzano*, 190 F. 2d at 689. Compare *People* v. *Gould*, 54 Cal. 2d 621, 354 P. 2d 865 (Traynor, J.). The opportunity to cross-examine the witness at trial, together with the greater reliability of earlier identifications under different circumstances, overcomes the traditional hearsay objections.* Consequently, Fine's testimony was admissible as substantive evidence under this well-established rule, and the broader issues presented by the reasoning of the court of appeals are not involved in the present case.

3. Contrary to petitioner's contention, the evidence, including the prior identifications, was more than adequate to support the verdict. The prior identifications were corroborated by the testimony of the F.B.I. agents that petitioner's tattoos were plainly visible when Fine identified him in the line-up (H. R. 41–43b, 77–78b). Since Fine did not recall seeing the tattoos on that occasion, his inability to remember

*Petitioner's reliance upon the early New York cases (Pet. 12), which permitted prior identification evidence only to corroborate a witness whose credibility had been impeached, is misplaced. Whatever the viability of that rule in other states, it has been overruled by statute in New York. N.Y. Code Crim. Proc. § 393-b; *People* v. *Trowbridge*, 305 N.Y. 471, 113 N.E. 2d 841. And it is not the rule in the federal courts, where such evidence is admissible on direct examination. See authorities cited *supra*.

seeing them during the hijacking—the reason he gave for modifying his identification of petitioner at the trial—does not assume the importance which petitioner would attach to it (I.R. 17a, 19a, Tr. 256). In addition, the stolen goods were found in the truck which petitioner had rented on the day of the robbery and which, according to his telephone conversation with the rental agency on the day before the goods were discovered, was still in his possession (II. R. 31–39b, 54–56b).

4. There is no merit to petitioner's objections to the district court's charge to the jury (Pet. 9–11). The trial judge was not required to comment on the evidence nor to single out any particular testimony or courtroom incident—such as the exhibition of petitioner's tattoo marks—to the jury. The judge's charge regarding constructive possession was proper since the stolen merchandise was recovered from the rented truck before petitioner returned the vehicle to the leasing company. And the reference to prior inconsistent statements did not single out any particular witness but instructed the jury generally on the subject of impeachment by unsworn out-of-court declarations. No objection was made to its inclusion in the instructions.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
T. WIESEMAN,
Attorneys.

JUNE 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964